Office - Supreme Court, U.S.
FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-694

In The
Supreme Court of the United States

OCTOBER TERM, 1982

MARION V. COFFRAN and CHARLES W. COFFRAN,
Petitioners,

v.

HITCHCOCK CLINIC, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

Irving H. Soden
(Counsel of Record)
Michael P. Lehman
SULLOWAY HOLLIS & SODEN
9 Capitol Street
Concord, New Hampshire 03301
(603) 224-2341

Counsel for the Respondent

QUESTIONS PRESENTED

1. Whether this Court should allow petitioners to dispute in this Court the standard of review used by the court of appeals, when petitioners specifically agreed with that standard in the proceedings below.

2. Whether the standard for review of new trial orders merits the consideration of this Court when the proper standard is already being applied consistently and appropriately in the courts of appeals.

3. Whether a case in which the trial court clearly and unequivocally abused its discretion, under even the strictest formulation of that standard, is the appropriate vehicle for this Court to use in reviewing the standard.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
REASONS FOR DENYING THE WRIT	1
A. THE ISSUE RAISED BY PETITIONERS WAS NOT IN DISPUTE BELOW	1
B. THE STANDARD FOR APPELLATE REVIEW OF NEW TRIAL ORDERS IS NOT ONE WHICH NEEDS CONSIDERATION BY THIS COURT	2
1. *This Court and the Federal Rules of Civil Procedure have specifically sanctioned appellate review of new trial orders*	2
2. *No Constitutional issue is raised by the court of appeals' order reversing the trial court's order for a new trial*	4
3. *The courts of appeals are in agreement that new trial orders may be reviewed on appeal using an abuse of discretion standard*	5
4. *Because the courts of appeals have used their power to reverse new trial orders sparingly, there is no need for supervisory intervention by this Court*	6
C. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION, UNDER ANY FORMULATION OF THE STANDARD, IN GRANTING A NEW TRIAL	8
D. CONCLUSION	11
APPENDIX A (Petitioners' Brief to the court of appeals)	1a

TABLE OF AUTHORITIES

	Page
CASES:	
Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941)	5
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)	2
Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965)	5,7
Bevevino v, Saydjari, 574 F.2d 676 (2d Cir. 1978)	5
Borras v. Sea-Land Service, Inc., 586 F.2d 881 (1st Cir. 1978)	1, 5, 6
Cardinale v. Louisiana, 394 U.S. 437 (1969)	1
Conway v. Chemical Leaman Tank Lines, Inc., 610 F.2d 360 (5th Cir. 1980)	5, 7
Duncan v. Duncan, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967)	5, 6, 7
Fairmount Glassworks v. Cub Fork Coal Co., 287 U.S. 474 (1933)	4
Fassbinder v. Pennsylvania Railroad Company, 322 F.2d 859 (3d Cir. 1963)	7
Fireman's Fund Insurance Co. v. AALCO Wrecking Company, Inc., 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973)	5, 6, 7
Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir. 1971)	7
Grunenthal v. Long Island Railroad Co., 393 U.S. 156 (1968)	3
Harris v. Quinones, 507 F.2d 533 (10th Cir. 1974)	5
Hourston v. Harvlan, Inc., 457 F.2d 1105 (3d Cir. 1972)	7
Lewin v. Metropolitan Life Insurance Company, 394 F.2d 608 (3d Cir. 1968)	7
Lind v. Schenley Industries, Inc., 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 385 (1960)	2, 5

	Page
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	1
Moist Cold Refrigerator Co. v. Lou Johnson Co., Inc., 249 F.2d 246 (9th Cir. 1957)	5
Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974)	5
Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317 (1967)	3
O'Neil v. W. R. Grace & Company, 410 F.2d 908 (5th Cir. 1969)	7
Portmon v. American Home Products Corp., 201 F.2d 847 (2d Cir. 1953)	4, 5
Spurlin v. General Motors Corp., 528 F.2d 612 (5th Cir. 1976)	6, 7
Taylor v. Washington Terminal Company, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969)	5, 6, 7
Thompson v. Trent Maritime Co. Ltd., 353 F.2d 632 (3d Cir. 1965)	7
United States v. Johnson, 327 U.S. 106 (1946)	4
Vander Zee v. Karabatsos, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979)	7
CONSTITUTIONAL PROVISION:	
Amendment VII	1, 3, 4, 5, 8
STATUTES AND RULES:	
Fed R. Civ. P. 50(c)(1)	3
OTHER AUTHORITIES:	
11 C. Wright and A. Miller, *Federal Practice and Procedure* (1973)	4, 5

REASONS FOR DENYING THE WRIT

A. THE ISSUE RAISED BY PETITIONERS WAS NOT IN DISPUTE BELOW.

The settled practice in this Court is not to consider, except in exceptional cases, questions which were not disputed below. *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430 (1940). This rule extends to newly raised Constitutional issues, such as the purported Seventh Amendment issue which petitioners raise for the first time here. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). Although the proper standard of review was discussed in petitioners' Brief below, it was neither disputed nor argued by petitioners. While this Court is certainly able to review issues which were raised in the court below, it would be extraordinary to allow petitioners to argue here an issue which, though raised, they did not dispute below.

Even a cursory reading of petitioners' Brief to the court of appeals (reproduced herein as Appendix A) demonstrates that petitioners not only failed to dispute the reviewability of the trial court's decision, but agreed that the standard of review used by the first circuit in reviewing new trial orders was proper and, furthermore, cited with approval several of the same cases which they now argue were wrongly decided.

Petitioners stated below that, "The trial court's granting of a motion for new trial must be sustained on appeal unless there has been an abuse of discretion." (App. A at 17a) Petitioners cited for this statement the important first circuit case of *Borras* v. *Sea-Land Service, Inc.,* 586 F.2d 881 (1st Cir. 1978), which held, in direct contradiction of petitioners' current position, that:

> "Where the basis for a new trial is that the verdict is contrary to the great weight of the evidence, the modern trend has been away from earlier decisions that the district court's discretion is virtually unlimited." 586 F.2d at 887.

Not only did petitioners agree that an abuse of discretion review was proper, they cited with approval, and quoted at length from, the very case which they now attack most vigorously, *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960), a case supporting the proposition that a reviewing court should closely scrutinize a trial court's granting of a new trial in derogation of a jury's verdict. (App. A at 18a.)

To allow petitioners now to attack a proposition with which they fully agreed in the court below would not only be contrary to the established practice of this Court, it would seriously interfere with the efficient administration of justice and the morale of the courts of appeals.

B. THE STANDARD FOR APPELLATE REVIEW OF NEW TRIAL ORDERS IS NOT ONE WHICH NEEDS CONSIDERATION BY THIS COURT.

The issue raised by petitioners is not one which merits the attention of this Court. Contrary to petitioners' assertions, this Court has not for all practical purposes forbidden appellate review of new trial decisions. Furthermore, the courts of appeals are in almost unanimous agreement that new trial orders may be reviewed using an abuse of discretion standard, and they have been extremely reluctant to reverse trial courts using this standard, even when it is applied somewhat more strictly in the review of cases in which the trial court has ordered a new trial on evidentiary grounds.

1. *This Court and the Federal Rules of Civil Procedure have specifically sanctioned appellate review of new trial orders.*

Contrary to petitioners' assertions, this Court has specifically sanctioned appellate review of new trial orders. In *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980), the very case relied heavily upon by petitioners, the Court stated, "A litigant is free to seek review of the propriety of such an order

on direct appeal after a final judgment has been entered." 449 U.S. at 36. While this power of a court of appeals to overturn a trial court's new trial order is admittedly limited, it nevertheless exists, as is expressly recognized in Federal Rule of Civil Procedure 50(c)(1), which provides that:

> "... In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed *unless the appellate court has otherwise ordered.*" (Emphasis added.)

This Court emphasized the clear meaning of this Rule in *Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317 (1967), stating:

> "As the Advisory Committee's Note to Rule 50(c) makes clear, Rule 50(c)(1) contemplates that the appellate court will review on appeal both the grant of judgment n.o.v. and, if necessary, the trial court's conditional disposition of the motion for new trial. *This review necessarily includes the power to grant or to deny a new trial in appropriate cases.*" 386 U.S. at 323. (Emphasis added.)

Not only has this court sanctioned close appellate review of new trial orders, it has even itself engaged in such review. In *Grunenthal* v. *Long Island Railroad Co.*, 393 U.S. 156 (1968), this Court undertook a detailed analysis of the evidence supporting a trial court's denial of a new trial on evidentiary grounds and noted with approval, in the similar situation of the review of excessive awards, that:

> "All 11 courts of appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." 393 U.S. at 157, n.3.

Thus, contrary to petitioners' allegations, this Court has specifically sanctioned, and even itself engaged in, limited appellate scrutiny of new trial orders. The court below was not, therefore, disobeying this Court when it reviewed the trial

court's decision; rather, it was utilizing a Constitutionally necessary power which has been sanctioned by this Court.

2. *No Constitutional issue is raised by the court of appeals' order reversing the trial court's order for a new trial.*

The issue raised by petitioners is not one of Constitutional dimensions as they would have the Court believe. On the contrary, both the courts of appeals and the commentators have recognized that appellate review of an order granting a new trial, which has overturned a jury's verdict, is a necessary protection for litigants' rights under the Seventh Amendment. This essential distinction between the review of orders which overturn a jury's verdict and the review of simple denials of new trial motions was not reached in the early decisions of this Court relied upon by petitioners, *Fairmount Glassworks* v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933) and *United States* v. *Johnson*, 327 U.S. 106 (1946), and was not even perceived to be an issue at all in such early cases as *Portman* v. *American Home Products Corp.*, 201 F.2d 847 (2d Cir. 1953), heavily relied upon by petitioners.

By contrast, this distinction has been recognized by many of the courts of appeals in recent times and has been succinctly analyzed by Professor Charles Allen Wright:

> "Review of an order granting a new trial because the verdict is against the weight of the evidence is a different matter. The older cases did not perceive the difference and often said that neither the grant nor denial was reviewable. *There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial.* In this instance, the appellate court is not re-examining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it." 11 C. Wright and A. Miller, *Federal Practice and Procedure*, §2819, p. 126 (1973). (Emphasis added.)

In the present case, the court of appeals simply reinstated the jury's verdict, a verdict to which, absent some grievous error by the jury, the defendant was entitled by the Seventh Amendment. Thus the reversal of the trial court was not in derogation of the Constitution but rather in support of it. As Professor Wright has recognized, *id.*, in such circumstances there exists no Constitutional question for this Court to review.

3. *The courts of appeals are in agreement that new trial orders may be reviewed on appeal using an abuse of discretion standard.*

In an effort to obtain review by this Court, petitioners have artfully painted a picture of total confusion among the courts of appeals as to the proper standard for reviewing new trial orders. In fact, the appellate courts are in almost unanimous agreement that such orders may be reviewed on appeal and may be reversed where the trial court clearly abused its discretion in evaluating the evidence.[1]

Not only are the courts of appeals in agreement that new trial orders may be reviewed using an abuse of discretion standard, many of the courts have also expressly approved the

---

[1] All but two circuit courts have expressly agreed with this proposition: *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978); *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied* 364 U.S. 835 (1960); *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350 (4th Cir. 1941); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980); *Duncan* v. *Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Nanda* v. *Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1974); *Fireman's Fund Insurance Co.* v. *AALCO Wrecking Company, Inc.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co., Inc.*, 249 F.2d 246 (9th Cir. 1957); *Harris* v. *Quinones*, 507 F.2d 533 (10th Cir. 1974); *Taylor* v. *Washington Terminal Company*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969). The eleventh circuit has yet to rule on the question, and the second circuit, without expressly so stating, appears no longer to be following its early decision in *Portman* v. *American Home Products, Inc.*, 201 F.2d 847 (2d Cir. 1953). *See, Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965); *Bevevino* v. *Saydjari*, 574 F.2d 676, 686 nn. 29-30 (2d Cir. 1978).

logic of *Lind* v. *Schenley Industries, Inc., supra.*[2] In fact, even the second circuit is no longer strictly following its old holding in *Portman* v. *American Home Products Corp.*, 201 F.2d 847 (2d Cir. 1953), the case upon which petitioners place so much weight. In *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), that court did closely review a trial court's conditional new trial order and reversed the order after a detailed review of the evidence. This leaves no circuit court which has ever expressly disagreed with *Lind.*

While it is no doubt true, as petitioners argue, that the courts of appeals have used different verbal formulas to express exactly what actions of trial courts amount to "abuses of discretion," it is also true that the term is not one which lends itself to precise definition. Further, it is clear that the courts do agree on the basic principle that a trial court's order granting of a new trial should not be set aside unless the judge has clearly abused the discretion with which he has been entrusted. When such is the case, no useful purpose would be served by this Court's issuance of a further array of adjectives in an attempt to provide additional definition to an already well-recognized and accepted standard.

4. *Because the courts of appeals have used their power to reverse new trial orders sparingly, there is no need for supervisory intervention by this Court.*

In keeping with their articulated positions that trial courts' rulings on new trial orders should be given great deference and

---

[2] *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978); *Spurlin* v. *General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976); *Duncan* v. *Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Fireman's Fund Insurance Co.* v. *AALCO Wrecking Company, Inc.*, 466 F.2d 179 (8th Cir. 1972) *cert. denied*, 410 U.S. 930 (1973); *Taylor* v. *Washington Terminal Company, Inc.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969).

reversed only when discretion is clearly abused, the courts of appeals have in fact used this power exceedingly sparingly. The present case, for instance, is the only decision of the first circuit in which it has ever reversed a trial court's order granting a new trial strictly on evidentiary grounds. No circuit has reversed an order granting a new trial on evidentiary grounds more than five times since *Lind* v. *Schenley Industries, Inc., supra,* was decided in 1960.[3] Even more significant, our research has disclosed a *total* of only thirteen cases, out of the hundreds in which such an order was sought, in all the courts of appeals combined in those twenty-two years, in which such an order has been reversed.[4] The paucity of such decisions hardly amounts to a "modern trend of according little or no deference to trial judge's rulings on new trial motions," as petitioners would have us believe. Rather, it shows affirmatively the great deference which the courts of appeals still show to a trial judge's new trial order. This is not a situation which calls for reaffirmation by this Court of a principle which is being strictly adhered to by the circuit courts.

---

[3] *Grove* v. *Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir. 1971); *Lewin* v. *Metropolitan Life Insurance Company*, 394 F.2d 608 (3d Cir. 1968); *Hourston* v. *Harvlan, Inc.*, 457 F.2d 1105 (3d Cir. 1972); *Thompson* v. *Trent Maritime Co. Ltd.*, 353 F.2d 632 (3d Cir. 1965); *Fassbinder* v. *Pennsylvania Railroad Company*, 322 F.2d 859 (3d Cir. 1963).

[4] In addition to those cases cited in Note 3: *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969); *Vander Zee* v. *Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979); *O'Neil* v. *W. R. Grace & Company*, 410 F.2d 908 (5th Cir. 1969); *Spurlin* v. *General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980); *Duncan* v. *Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Fireman's Fund Insurance Co.* v. *AALCO Wrecking Company, Inc.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965).

C. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION, UNDER ANY FORMULATION OF THE STANDARD, IN GRANTING A NEW TRIAL.

Not only is the standard for review of new trial orders not one which merits this Court's consideration, the present case is not an appropriate one for any such review. Not only did the court below adhere to the standard of review which is almost universally recognized as proper, the case itself was one in which the trial judge clearly invaded the jury's province in total derogation of the Seventh Amendment right to trial by jury.

The court below paid strict attention to the traditional deference accorded a trial judge. The court did recognize that "the trial judge's discretion, although great, must be exercised with due regard to the rights of both parties to have questions which are fairly open resolved finally by the jury at a single trial." (683 F.2d at 6; petitioners' Brief, App. A at 3a.) However, the court also specifically noted the limitations on its power of review: " . . . [W]e emphasize that the district court's discretion to grant a new trial remains large, and will not be disturbed if reasonably based." (*Id.* at n.l.)

Not only did the court of appeals correctly articulate the appropriate standard of review, it found itself forced to reverse by factors which would merit reversal under any possible formulation of the abuse of discretion standard. As the court noted in its opinion, the trial court made several clear errors. First, it relied on a theory (that the administration of Halothane aggravated a pre-existing condition of viral hepatitis) which was never even presented to the jury. (683 F.2d at 8; petitioners' Brief, App. A at 6a.) Second, the trial court erroneously believed that one test, the Australian antigen test, had ruled out the possibility that Mrs. Coffran had viral hepatitis, a fact which, if true, would provide convincing support for petitioners' critical contention that Mrs. Coffran actually had Halothane-induced hepatitis. In fact, as the court

of appeals noted, the evidence at trial was *uncontradicted* that the test had no such meaning. (683 F.2d at 9; petitioners' Brief at App. 7a.) The court of appeals also noted that the trial court's reliance on the theory that Halothane aggravated pre-existing viral hepatitis was totally inconsistent and irreconcilable with its belief that the Australian antigen test had ruled out viral hepatitis (683 F.2d at 9; petitioners' Brief, App. A at 6a.)

Finally, and most critically, the court of appeals noted that the trial judge had totally omitted any consideration of a crucial link in the evidentiary chain: whether the tests which the petitioners maintained that the respondent should have performed would, if performed, have been abnormal. (683 F.2d at 10; petitioners' Brief, App. A at 10a.) The court of appeals, in contrast to the trial court, did analyze this issue and concluded that the jury could reasonably have believed the ample evidence presented by the defendant on this point. *(Id.)*

In addition to these clear and important errors, the court also noted that the trial court had chosen to totally disbelieve the testimony on these and other points of respondent's expert, Dr. Nicholas Greene, Chairman of Yale Medical School's Department of Anesthesiology, and "the witness who had done the most research on the precise issue of the causal connection between Halothane and hepatitis . . . ." (683 F.2d at 9; petitioners' Brief, App. A at 8a.) The court of appeals was extremely troubled that the trial court had found that the jury had been seriously mistaken in accepting the testimony of such an obviously well-qualified expert, (683 F.2d at 9; petitioners' Brief, App. A at 10a), and concluded that the trial court had indeed acted as a "thirteenth juror" in the case. As the court of appeals noted:

> "In the absence of special circumstances not present here, such as a vast disparity in qualifications or the presence of strong impeaching factors, we do not think it can be said that a verdict merely crediting one witness over another

witness is against the clear weight of the evidence." 683 F.2d at 11; petitioners' Brief, App. A at 11a.

Not only did the court of appeals rely on these clear errors in the trial court's opinion, it expressed grave reservations about several other critical elements of that opinion, elements which it accepted for the purposes of its opinion only because a closer review of them was not essential to its decision. Thus the court of appeals assumed, for the purposes of its opinion only:

1. that a jury finding that Mrs. Coffran did not have Halothane hepatitis, despite much evidence to the contrary, would have been against the clear weight of the evidence; (683 F.2d at 10; petitioners' Brief, App. A at 8a;)

2. that an abnormal eosinophil count, if the test had been performed, would, as the trial court believed, have resulted in use of a different anesthetic (a conclusion the court of appeals termed "speculative;") (683 F.2d at 10; petitioners' Brief, App. A at 9a;) and

3. that Mrs. Coffran was indeed sensitized to Halothane (a conclusion of the trial court which the court of appeals accepted, for the purposes of its opinion "with some doubts.") (*Id.*)

This case is therefore not one in which the decision of the court of appeals was based simply on its own balancing of the evidence without according due deference to the trial court. Rather, it was based on clear mistakes of the trial court, on critical gaps in the court's opinion, and on the trial court's obviously faulty reasoning. Such a case, where the trial court so clearly abused its discretion under any formulation of the standard of review, is not an appropriate vehicle for this Court to reassess that standard.

D. CONCLUSION

For the reasons stated, the Respondent, Hitchcock Clinic, Inc., respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Irving H. Soden
(*Counsel of Record*)
Michael P. Lehman
SULLOWAY HOLLIS & SODEN
9 Capitol Street
Concord, New Hampshire 03301
(603) 224-2341

Counsel for the Respondent

APPENDIX A (Petitioners' Brief to the Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1090

MARION V. COFFRAN and CHARLES W. COFFRAN
Plaintiffs, Appellees

v.

HITCHCOCK CLINIC, INC.
Defendant, Appellant

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR PLAINTIFFS, APPELLEES

BROWN AND NIXON PROFESSIONAL ASSOCIATION
80 Merrimack Street
Manchester, New Hampshire 03101
(603) 669-8080

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	3a
STATEMENT OF THE ISSUE	5a
STATEMENT OF THE CASE	6a
STATEMENT OF THE FACTS	8a
Prior Medical History	8a
The Evidence Concerning Halothane	8a
The April 15, 1970 Operation	11a
The June 5, 1970 Operation	12a
Marion Coffran's Post-Operative Hepatitis	13a
ARGUMENT	
I. *THE TRIAL COURT EXERCISED ITS SOUND DISCRETION IN GRANTING PLAINTIFFS' MOTION FOR NEW TRIAL ONLY AS TO DEFENDANT HITCHOCK CLINIC, INC. ON THE GROUNDS THAT THE JURY VERDICT WAS SERIOUSLY ERRONEOUS, CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE, AND CONSTITUTED A GRAVE MISCARRIGAGE OF JUSTICE*	15a
A. *The Trial Judge is Obligated to Set Aside Verdicts Which Are Against the Great Weight of the Evidence*	15a
B. *The Trial Court's Decision to Grant a New Trial Must be Sustained in the Absence of an Abuse of Discretion*	17a
CONCLUSION	24a

TABLE OF AUTHORITIES

Cases

Aetna Casualty and Surety Co. v. *Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941) 16a, 21a

Borras v. *Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978) 15a, 16a, 17a

Gebhart v. *Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965) 18a

Guest v. *Breedin*, 257 F.2d 22 (4th Cir. 1958) 17a

Hanson v. *Shell Oil*, 541 F.2d 1352 (9th Cir.) *cert. denied* 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977) 23a

Harris v. *Quinones*, 507 F.2d 533 (10th Cir. 1974). 16a

In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954). 18a

Klein v. *Auto Owners, Insurance Co.*, 39 F.R.D. 24 (D.Minn. 1965) 15a

Lind v. *Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir.), *cert. denied*, 364 U.S. 835, 81 S.Ct. 58, L.Ed.2d 60 (1960) 18a, 19a

Rios v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986 (1st Cir. 1978) 20a

Spurlin v. *General Motors Corporation*, 528 F.2d 612 (5th Cir. 1976) 20a, 21a

Vezina v. *Amoskeag Realty Co.*, 110 N.H. 66, 260 A.2d 115 (1969) 23a

STATUTES

Fed. R. Civ. P. 59(a) 15a

28 U.S.C. §293(b) 6a

TREATISES

6A J. Moore, Moore's Federal Practice, §59-08[5], at 59-160 to 161 ..... 16a

6A, Moore's Federal Practice, §59-08[5], at 59-152 to 153 ..... 17a

Wright v. *Miller,* Federal Practice and Procedure Civil §2806, pp. 44-50 ..... 15a

MISCELLANEOUS

13 Stan. L. Rev. 383 (1961) 21a

STATEMENT OF THE ISSUE

I. WHETHER THE TRIAL COURT, HAVING REVIEWED ALL THE EVIDENCE, ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, DENYING THEIR MOTION FOR NEW TRIAL AS TO ONE DEFENDANT AND GRANTING THEIR MOTION FOR NEW TRIAL AS TO THE OTHER DEFENDANT UPON THE GROUNDS THAT THE VERDICT WAS SERIOUSLY ERRONEOUS, CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE AND WOULD RESULT IN A GRAVE MISCARRIAGE OF JUSTICE.

STATEMENT OF THE CASE

This is an appeal by the defendant from an Order of the Trial Court dated February 13, 1979, in which the trial judge granted plaintiffs' motion for new trial in a medical negligence case as to one defendant, while denying the same motion as to the other defendant in addition to denying a motion for judgment notwithstanding the verdict as to both defendants.

The plaintiffs, Marion and Charles Coffran, of Windsor, Vermont, filed a complaint in the United States District Court for the District of New Hampshire on September 30, 1975. The action claimed that the defendants, Mary Hitchcock Memorial Hospital and the Hitchcock Clinic, Inc., both of Hanover, New Hampshire, failed to exercise reasonable care in their diagnosis and treatment of Marion Coffran while she was hospitalized on two occasions in April and June of 1970. Jurisdiction for the action rested on diversity of citizenship and the statutory amount in controversy. (Appendix, 2-4)

The case was tried to a jury for 12 days beginning November 20, 1978, the Honorable Herbert N. Maletz, Judge, United States Customs Court sitting by designation pursuant to 28 U.S.C. §293(b), presiding. There were 11 volumes of trial transcript covering almost 1,700 pages of testimony, argument and jury charge. There were 15 witnesses and 51 exhibits. On December 8, 1978, the jury returned verdicts for both defendants and on December 11, 1978, Judge Maletz ordered judgment for the defendants. (Appendix, 10-11)

Plaintiffs filed a Motion for Judgment Notwithstanding the Verdict and Motion for New Trial in the Alternative on December 15, 1978. (Appendix, 12-15) Judge Maletz granted plaintiffs' Motion for New Trial as to defendant Hitchcock Clinic, Inc., and denied plaintiffs' Motion for New Trial as to defendant Mary Hitchcock Memorial Hospital and denied plaintiffs' Motion for Judgment Notwithstanding the Verdict as

to both defendants in an Order and Opinion dated February 13, 1979. (Appendix, 17-30)

The second trial of this action commenced on November 20, 1979 with the Honorable Martin F. Loughlin, United States District Judge for the District of New Hampshire, presiding. The second trial concluded on November 30, 1979, with the jury awarding verdicts in the amount of $284,500.00 for Marion Coffran and in the amount of $228,500.00 for Charles Coffran. The Court ordered judgment for the plaintiffs on December 4, 1979. (Appendix, 31-32)

Defendant Hitchcock Clinic, Inc. filed a Motion to Set Aside the Verdicts, for Judgment Notwithstanding the Verdicts, and in the Alternative for a New Trial on December 3, 1979. (Appendix, 33-34) The plaintiffs seasonably objected to this motion on December 7, 1979. (Appendix, 36-38) The Court denied this Motion on January 11, 1980. (Appendix, 39)

STATEMENT OF THE FACTS

Prior Medical History

Prior to her admission to Mary Hitchcock Memorial Hospital on April 14, 1970 for surgical repair of a right inguinal hernia, Mrs. Marion Coffran had been admitted to the hospital in 1960, at which time she gave birth to twins. Again in 1964 she was admitted for a vein stripping operation. The 1964 operation was Mrs. Coffran's first exposure to halothane. (Bricker, 26) Mrs. Coffran had a chronic dermatitis condition over her left ankle and an allergy to Benzocaine, which was noted in her April 14, 1970 admission history. (Appendix, 55-56) Mrs. Coffran suffered no obvious ill effects from that exposure, although she had an elevated temperature and a 17% Eosinophil count prior to the exposure, which were explained by an extensive skin lesion. (B. Greene, 872-873)

The Evidence Concerning Halothane

The use of halothane as a general anesthetic gained universal popularity subsequent to its introduction in this country in approximately 1959. (Sy, 1653) The widespread use of this anesthetic agent also touched off a running controversy in medical journals concerning its potential for causing severe and sometimes fatal liver damage. (Bricker, 63) Throughout the 1960's, the theory was articulated that halothane had the capacity to cause an allergic reaction or a hypersensitivity condition, which made multiple administrations potentially dangerous to certain patients. (McCleery, 674) The manufacturer of halothane, Ayerst Laboratory, included an insert with its product between 1968 and 1970 which warned that fatal massive hepatic necrosis or cholestatic jaundice were possible adverse reactions to the administration of halothane. The manufacturer further warned of repeat administrations of halothane when the previous exposure was followed by fever and jaundice or unexplained post-operative fever. (B. Greene, 797-799, Pl. Ex. 25)

Mrs. Coffran's present treating physician, Doctor Jack McCleery, a gastroenterologist, acknowledged the existence of halothane hepatitis as a medical entity and testified that repeat administrations of halothane in April and June, 1970 were the probable cause of her permanent liver damage. (McCleery, 381, 663) Doctor Nicholas Greene, defendant's expert, refused to acknowledge the existence of halothane hepatitis because it had not been proven to his satisfaction as a medical certainty. (N. Green, 999, 1131)

Halothane hepatitis is a clinical syndrome and is best identified by the existence of certain "signs or markers" of sensitization. (B. Greene, 750-751) The medical literature indicated that (1) obese (2) females (3) over forty years of age with a (4) history of allergy and about to undergo (5) major surgery in a (6) lengthy operation were the patients potentially most susceptible to halothane sensitization. (B. Greene, 750) Clinical indicators of halothane hepatitis were thought to be unexplained fever, eosinophilia and rashes or other evidence of drug allergies. (N. Greene, 1122-1123; B. Greene, 742, 755) Because of the potential risks of halothane sensitization, identification of any symptoms which suggest the patient is feeling below par following a prior exposure to halothane is important. (McCleery, 279-280)

Although the medical literature in the 1960's was replete with articles discussing the halothane hepatitis controversy, all the experts agreed that at the time of Marion Coffran's admissions in 1970 there existed no pre-operative test which could rule out her sensitivity to halothane. (Sy, 1617, 1679; B. Greene, 800, 894; N. Greene, 965) The lack of determinative tests to rule out halothane sensitivity therefore required that particular care be paid to any signs or markers indicating potential sensitivity in order to exclude the possibility of a previously unrecognized reaction to halothane. (Bricker at 191) The experts disagreed on the relative effectiveness of particular markers in forecasting adverse halothane reactions.

Doctor Barnett Greene, for example, testified that an elevated eosinophilia ("EOS") count or an abnormal erythrocyte sedimentation rate ("ESR") were markers of sensitivity. (B. Greene, 731, 735, 742, 746, 933) Eosinophils are a particular kind of white cell and a rise in eosinophils indicates there is some reaction of the body to a foreign substance or a toxic reaction. (Bricker, 20) Doctor Bricker testified that the normal range of eosinophils is 1-3%. (Bricker, 173) Doctor Nicholas Greene testified that the normal range of eosinophils is 0 to 17%, although he later stated that a 5% count, while normal, is at the high end of the normal range. (N. Greene, 1000-1002) Both Doctor Nicholas Greene and Doctor Barnett Greene agreed that an ESR finding of 43 was abnormal, but Doctor Nicholas Greene and Doctor McCleery testified these lab results, in and of themselves, were non-specific signs of halothane sensitivity. (B. Greene, 745, 746; N. Greene, 1106; McCleery, 529) An elevated sedimentation rate is also indicative of something wrong with the patient which demands further investigation. (B. Greene, 746; Bricker, 84)

Doctor Barnett Greene, Doctor McCleery, and Doctor Bricker, supported in their testimony by numerous medical articles regarding the halothane sensitization process, all testified that repeat administrations of halothane tended to increase the risks of an adverse reaction and subsequent hepatic damage. (Bricker, 191; B. Greene, 751, 752; McCleery, 676) Even Doctor Nicholas Greene admitted that recognized authorities in the field and notable studies, including the National Halothane Study, asserted that halothane hepatitis is most probably the result of a sensitization process, that repeat exposures should be avoided if possible, that thorough investigation is necessary in order to rule out a previous halothane reaction, that halothane sensitivity may not be clinically evident and may persist for long periods of time. (N. Greene, 1120-1123, 1135, 1147, 1150) Both Doctor Barnett Greene and Doctor McCleery agreed that there was no data to support any kind of hard and

fast rule regarding a proper interval of time between administrations of halothane because once a person became sensitized to halothane, there remained a lifelong risk of an adverse and permanently damaging reaction. (B. Greene, 919; McCleery, 582-584)

It was undisputed that Doctor Walter P. Sy, the anesthesiologist who selected halothane for both hernia repair operations in 1970 and also administered halothane at the June 5, 1970 operation, was aware of the potential risks of repeat exposures to halothane and recognized the possibility of a sensitization process. (N. Greene, 1108; Sy, 1567, 1673; Appendix, 54, 65)

The April 15, 1970 Operation

Marion Coffran had a complete blood count and urinalysis in the Outpatient Department at Mary Hitchcock Memorial Hospital which had been ordered by her surgeon, Doctor Mosenthal, on April 9, 1970. (Bricker, 22-23) She entered the hospital on April 14, 1970 in order to have an inguinal hernia repair on April 15, 1970. This operation was an elective major surgery. (Bricker, 43, 68)

Prior to surgery on April 14, 1970, Doctor Sy reviewed Mrs. Coffran's medical history and prepared his anesthesia note in which he suggested repeat administration of "halothane *pending* workup and lab." (Bricker, 32) Doctor Sy also noted her allergy to "caines." Yet, no further workup or lab tests were performed prior to the surgery and halothane exposure. (Bricker, 33) An ESR test was also ordered "pre-op stat" on the morning of April 15, 1970; but the results, which were abnormal, were not reported until the morning after her surgery. (B. Greene, 744-746) No attempt was made to follow up the 5% EOS count or the abnormal ESR subsequent to their discovery. (B. Greene, 746-747, 751-752)

On April 17, 1970, Mrs. Coffran exhibited an elevated post-operative temperature of 100.8 degrees. (Bricker, 37) The fever was diagnosed as pneumonostasis, a lung condition, treated and subsequently subsided. (Bricker, 37, 42) Although Mrs. Coffran's condition was diagnosed as pneumonostasis, no further testing was performed to rule out an adverse halothane reaction. (Bricker, 42; B. Greene, 882) Even Doctor Nicholas Greene testified that, when he first reviewed the medical records, he indicated that the elevated temperature of April 17, 1970 had not been explained by physical exam. (N. Greene, 1169) The medical literature identified "unexplained post-operative fever" as an important warning sign of halothane sensitivity. (N. Greene, 1135)

The June 5, 1970 Operation

Marion Coffran was readmitted to the hospital on June 4, 1970 for repair of a right femoral hernia, which had reoccurred notwithstanding the April surgery. Although seven weeks had passed since her last operation, no pre-operative blood tests or lab work other than urinalysis were performed prior to another administration of halothane on June 5, 1970. (Bricker, 47) Doctor Walter Sy, who ordered halothane for the June 5, 1970 operation, testified:

> Every patient coming for surgery must have what is called a complete blood count, so-called CBC, in which the various cells, red cells, white cells, platelet cells are looked at under the microscope. Their amount is measured and that is recorded. In addition, an analysis I mentioned of urine is made. These two things are required by the laws of the hospital for the practice of good surgery and medicine. (Sy, 1687)

Included in any CBC is an EOS count. (Sy, 1688) Every expert witness agreed that the failure to perform pre-operative blood tests or lab work prior to the June 5, 1970 surgery failed to comply with reasonable standards of medical care and treat-

ment. (N. Greene, 1057; B. Greene, 802-803; Bricker, 45; McCleery, 342) Doctor Nicholas Greene, however, testified that the failure to perform any pre-operative testing on June 4, 1970 made no difference in the outcome of the case. (N. Greene, 1004-1005)

Doctors Bricker, McCleery, and Barnett Greene all testified that Doctor Sy's anesthesia note of June 4, 1970 was inaccurate insofar as he wrote that no post-operative fever had followed the prior administrations of halothane. (B. Greene, 757; Bricker, 94; McCleery, 363, 370-371) Following the June 5, 1970 exposure to halothane, Mrs. Coffran ran a fever, which was unexplained in the records. All the doctors agreed that the post-operative fevers in June could be characterized as spikes. (N. Greene, 994; McCleery, 384-386; Sy, 1674-75; Bricker, 105, 125; B. Greene, 773) Whether the spikes displayed the characteristics of halothane spikes was disputed, although Doctor Sy later noted that the halothane reaction was all so atypical. (N. Greene, 996; Sy, 1675; McCleery 367; B. Greene, 773)

Marion Coffran's Post-Operative Hepatitis

Marion Coffran returned to the hospital on June 18, 1970, displaying obvious signs of jaundice. Doctor Mosenthal's admission note diagnosed her condition as probable hepatitis, possibly linked to halothane exposure. (Bricker, 98) The diagnosis was subsequently changed to halothane hepatitis. (McCleery, 321) The history taken at the time of her June 18, 1970 admission identified all the classic symptoms of hepatitis. (McCleery, 325-326) An EOS count taken on July 7, 1970, prior to Mrs. Coffran's discharge from the hospital and after the hepatitis had fully manifested itself, registered 7%. (B. Greene, 812) The fourteen physicians who examined or treated Marion Coffran for hepatitis all agreed, based on their combined judgment, experience and background, that Mrs. Coffran was

more probably than not suffering from halothane hepatitis. (McCleery, 664) Even Doctor Sy concurred with the diagnosis. (Sy, 1675)

Only Doctor Nicholas Greene, who never had the benefit of treating or examining Mrs. Coffran and was unaware of the full range of testing performed subsequent to Mrs. Coffran's June 18, 1970 admission in an attempt to rule out diagnoses other than halothane hepatitis, disputed the diagnosis of halothane hepatitis. (N. Greene, 996, 1015-1016) No other reasoned explanation for Mrs. Coffran's hepatic condition has been found in the years since its onset. (McCleery, 508, 516)

ARGUMENT

I. THE TRIAL COURT EXERCISED ITS SOUND DISCRETION IN GRANTING PLAINTIFFS' MOTION FOR NEW TRIAL ONLY AS TO DEFENDANT HITCHCOCK CLINIC, INC. ON THE GROUNDS THAT THE JURY VERDICT WAS SERIOUSLY ERRONEOUS, CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE, AND CONSTITUTED A GRAVE MISCARRIAGE OF JUSTICE.

A. The Trial judge is obligated to Set aside Verdicts Which are Against the Great Weight of the Evidence

The power of a district court judge to grant a new trial on the ground that the jury's verdict was against the weight of the evidence is well established. *Wright* v. *Miller,* Federal Practice and Procedure; Civil §2806, pp. 44-50. Rule 59(a) of the Federal Rules of Civil Procedure provides as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in action at law in the Courts of the United States.

This rule recognizes the common law principle that it is the duty of a trial judge who is not satisfied with a jury's verdict to set it aside and grant a new trial; the Trial Court has the obligation to see to it that justice is done in each case. *Klein* v. *Auto Owners, Insurance Co.,* 39 F.R.D. 24 (D.Minn. 1965).

A motion for new trial is addressed to the sound discretion of the Trial Court. *Borras* v. *Sea-Land Service, Inc.,* 586 F.2d 881 (1st Cir. 1978). In ruling upon a motion for a new trial, the judge is free, if not compelled, to weigh the probative value of the evidence, for it is

> . . . the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against

> the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice. *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 886, (1st Cir. 1978), citing *Aetna Casualty and Surety Co.* v. *Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941).

The scope of the trial judge's discretion is not limitless. The trial judge must balance the respect owed to the findings of the jury as the triers of fact with his overriding obligation to insure that justice is achieved. In this regard, the trial judge cannot act merely as a thirteenth juror and set aside the verdict because he would have reached a different result, nor can he set aside the verdict because he believes a contrary result would be more reasonable. *Id.* at 887. Rather he should not set aside the verdict

> . . . unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not. *Id.* at 886, citing 6 A J. Moore, Moore's Federal Practice, §59-08[5], at 59-160 to 161.

Implicit in the trial judge's power to order new trials is his freedom to weigh all the evidence and, in his overriding obligation to prevent unjust jury verdicts lies the authority to set aside a verdict even though there may be substantial evidence to support it. *Harris* v. *Quinones*, 507 F.2d 533 (10th Cir. 1974). *Harris* involved an automobile-motorcycle collision at an intersection. The testimony tended to show that the defendant, although blinded by the sun, proceeded out into an intersection where she collided with the plaintiff. The jury returned a verdict for the defendant presumably on the theory that the plaintiff should have seen and avoided the defendant although the evidence was to the contrary. The Trial Court granted plaintiff's motion for a new trial on the grounds that the verdict was against the decided weight of the evidence. Plaintiff recovered a jury verdict at the conclusion of the second trial.

The reviewing court upheld the Trial Court's discretionary ruling which had been based on his conviction that the jury had ignored uncontroverted evidence of defendant's negligence and had relied upon evidence of little or no credible weight in finding plaintiff contributorily negligent.

In *Guest* v. *Breedin,* 257 F.2d 22 (4th Cir. 1958), the Trial Court in this medical negligence case erroneously granted judgment n.o.v. and a new trial in the alternative. The expert testimony was conflicting on the issue of the cause of death while the decedent was undergoing surgery. On appeal, the Court held that granting a new trial was not an abuse of discretion even though there was sufficient evidence to defeat the judgement n.o.v.

The trial judge's obligation to review all the evidence distinguishes his consideration of a motion for new trial from a motion for judgment notwithstanding the verdict, wherein he is obliged to take the view of the evidence most favorable to the party against whom the motion is made, together with the benefit of all inferences reasonably drawn therefrom, and determine whether the evidence is legally sufficient to warrant taking the case to the jury. 6A, Moore's Federal Practice, §59-08[5], at 59-152 to 153.

Here, the Trial Court in its Order of February 13, 1979 recognized that sufficient evidence existed to take the case to the jury as to both defendants, but concluded after reviewing all the evidence that the verdict as to defendant Hitchcock Clinic, Inc. was seriously erroneous and a miscarriage of justice.

B. *The Trial Court's Decision to Grant a New Trial Must be Sustained in the Absence of an Abuse of Discretion*

The Trial Court's granting of a motion for new trial must be sustained on appeal unless there has been an abuse of discretion. *Borras* v. *Sea-Land Services, Inc.,* 586 F.2d at 887. The granting of a motion for new trial in a diversity action on

the ground that the verdict is against the great weight of the evidence is governed by federal rather than state law. *Gebhart* v. *Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965).

The meaning of the phrase "abuse of discretion" has long evaded meaningful construction. The definition most often quoted comes from *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954), wherein Justice Magruder stated:

> Abuse of discretion is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

The Court in *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir.), *cert. denied*, 364 U.S. 835, 81 S.Ct. 58, L.Ed.2d 60 (1960), discussed the relevant factors to be weighed by the Trial Court. In his duty to avoid miscarriages of justice,

> [T]he trial . . . should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. *Id.* at 89, citing 6A Moore's Federal Practice, §59-08[5], at 59-160.

In *Lind* the plaintiff brought a contract action against his employer for compensation allegedly due him pursuant to a written memorandum and oral conversations. The jury found for the plaintiff after the court denied defendant's motion for directed verdict. Defendant moved for judgment notwithstanding the verdict and in the alternative for a new trial. The Trial Court set aside the jury's verdict and entered a judgment n.o.v. for defendant on the grounds that the plaintiff had failed to

prove that representatives of the defendant had apparent authority to offer the alleged contract terms and that the terms of the alleged contract were sufficiently definite and certain to be enforceable. The Court held that the trial judge erred in finding that insufficient evidence was introduced to sustain the jury verdict.

The trial judge also granted the alternative motion for new trial because it found the jury's verdict contrary to the weight of the evidence, contrary to law and the result of evidentiary error. Having disposed of the later two grounds, the Court considered the basis of the claim that the verdict was against the weight of the evidence, recognizing at the outset that "special or unusual circumstances" might warrant reversal of the Court's exercise of discretion. *Id.* at 88.

The Court thereupon fashioned a new rule governing review of cases where a new trial is granted because the verdict is against the weight of the evidence as opposed to cases where a new trial is granted because some "undesirable or pernicious" element has been introduced into the trial such as evidence improperly admitted or newly discovered evidence:

> ... where no undesirable or pernicious element has occurred ... It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case when a new trial is granted because of some undesirable or pernicious influence intruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial. *Id.* at 90.

The Court further recognized such scrutiny must nevertheless allow the trial judge greater discretion to closely evaluate the verdicts

> [W]here a trial is long and complicated and deals with a subject matter not lying within the common knowledge of the jurors. *Id.* at 90.

The Court held, therefore, that because the subject matter was simple and involved "ordinary commercial practices" familiar to most laymen, the case turned upon the veracity of the witnesses and thus, in the absence of extensive expert testimony and complex issues, the Court concluded that the trial judge had abused its discretion by substituting its judgment on the controlling issue of credibility for that of the jury.

In this same regard, this Court in *Rios* v. *Empresas Lineas Maritimas Argentinas,* 575 F.2d 986 (1st Cir. 1978), stated its support for the proposition that where a trial judge is faced with a motion for new trial in which a party claims that the verdict is against the weight of the evidence, but urges in support thereof only that the testimony is conflicting, particular care should be exercised in order to avoid usurping the jury's function. The Court implied that the trial judge is nonetheless obligated to review all the evidence in the discharge of his duty to oversee the jury's verdict. *Id.* at 991. *Rios,* therefore, supports a trial judge's independent exercise of discretion so long as it is not unreasonable.

In this case, the trial was lengthy and the issues were complex, involving extensive reliance on medical literature and competing theories about the etiology of a rare medical condition which remains unsettled even among recognized medical authorities. This case didn't turn simply on the credibility of two conflicting interpretations of the facts but rather upon the probability, not the medical certainty, that the failure of the defendant to conform to reasonable standards of medical practice resulted in undisputed damage to the plaintiffs. Under these circumstances and in light of his opportunity to evaluate the overall conduct of the trial, the trial judge's reasoned decision in this case is not so clearly erroneous as to warrant setting it aside.

Contrary to strong common law principle, defendant's counsel relies upon *Spurlin* v. *General Motors Corporation,* 528 F.2d 612 (5th Cir. 1976) in support of his contention that this

Court is obliged to apply a constitutional standard of strict scrutiny in order to preserve the integrity of the Seventh Amendment. What counsel fails to acknowledge, however, is that the right to jury trial guaranteed by the Seventh Amendment necessarily includes the trial judge's common law responsibility to prevent miscarriages of justice and to set aside unjust verdicts. This inherent power of the trial judge is generally regarded as a safeguard of the right to trial and not a derogation of that right. *Aetna Casualty and Surety Co.* v. *Yeatts* at 353. See also 13 Stan. L. Rev. 383, 387, 1961.

The *Spurlin* case involved consolidated wrongful death and personal injury actions brought against the manufacturer of a 1965 school bus which alleged that the failure of the bus's brakes and the resulting crash was the result of the negligent design of the braking system. The jury returned a substantial verdict for the plaintiff, which the Court nullified by granting defendant's motion for judgment n.o.v. and for a new trial in the alternative on the ground that the verdict was not supported by the evidence.

The Court examined the legal sufficiency of the evidence in a light most favorable to the plaintiff and concluded that ample evidence existed to warrant taking the case to the jury and therefore reversed the trial court's grant of judgment n.o.v.

Turning to the propriety of the Trial Court's order on the alternative motion for new trial, the Court concluded that the evidence was at most conflicting on the issues of negligent design and proximate cause and to allow the Trial Court's decision to stand under these circumstances would violate the settled rule that a court is not free to set aside a verdict merely because the judge feels that another result is more reasonable. The Trial Court's ruling was further objectionable becuase, unlike this case, the issues presented to the jury were relatively simple and the technical data was not overwhelming.

Defense counsel claims that the trial judge in this case abused his discretion in three particulars. The first ground is that the trial judge unjustifiably concluded that the failure to perform the requisite pre-operative testing prior to the June 5, 1980 administration of halothane caused or contributed to the resulting hepatitis. Counsel's position neglects to recognize the very theory of halothane sensitization.

The evidence was undisputed that an ongoing controversy regarding halothane hepatitis was a topic of intense debate during the 1960's. Furthermore, the lack of a definitive pre-operative test to rule out halothane sensitivity only increased the need to fully investigate any signs or markers which could indicate an adverse reaction to halothane. Where, as here, the plaintiff was undergoing elective surgery for a condition from which she had been suffering for over 20 years, (Appendix, 54), and she satisfied numerous criteria for potential sensitivity (B. Greene, 750), the risk of adverse results far outweighed the need for less than thorough pre-operative testing. The failure to provide Marion Coffran that pre-operative care foreclosed the opportunity to discover signs of sensitivity prior to her third exposure to halothane. In light of the evidence introduced at trial, the trial judge's conclusion was logical, reasonable and supported by the overwhelming weight of the evidence.

Secondly, counsel contends that the trial judge's reference to a 7% EOS count lacks any support in the record. The undisputed testimony of Doctor Barnett Greene was that Marion Coffran displayed a 7% EOS count on July 7, 1970, the day before she was discharged from the hospital following her June 18, 1970 admission for jaundice. (B. Greene, 812) This test was taken at a time after her symptoms of hepatitis had become clinically obvious. It was therefore not unreasonable for the trial judge to conclude that a 7% reading was clearly indicative of hypersensitivity. The 7% reading became all the more probative in light of the differing testimony regarding not

only normal EOS levels, but whether an EOS count could be indicative of sensitivity. (N. Greene, 1001; Bricker, 191) Even assuming for the sake of argument that the trial judge improperly considered this evidence in concluding that eosinophilia may indicate drug sensitivity, such erroneous reliance on just one of several grounds constituting the court's order is not an abuse of discretion which warrants reversal. *Hanson* v. *Shell Oil,* 541 F.2d 1352, 1358 (9th Cir.) *cert. denied* 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

Finally, counsel claims that the trial judge abused its discretion in concluding that the June exposure aggravated a pre-existing hepatic condition on the ground no such probative was introduced. The theory of a pre-existing condition was introduced by defendant's own expert witness, Doctor Nicholas Greene. Doctor Bricker also commented upon the probabilities of a pre-existing viral hepatitis condition causing Mrs. Coffran's resulting injuries. (Bricker, 194) Plaintiffs pursued this alternative theory throughout trial and in their closing arguments. Proximate cause is not defeated merely because direct evidence of the cause of plaintiff's subsequent injuries is not available so long as causation may be found by reasonable inference. *Vezina* v. *Amoskeag Realty Co.,* 110 N.H. 66, 260 A.2d 115 (1969). In *Vezina,* plaintiff, a tenant in defendant's rooming house, fell in bathroom on the premises. Plaintiff alleged several different conditions were responsible for her fall. The Court rejected defendant's argument that since plaintiff was unable to describe the cause of her fall, a jury shouldn't be able to speculate among a number of possible causes. *Id.* at 68.

In this case, having introduced the claim of a pre-existing hepatic condition, defendant cannot claim an abuse of discretion because the trial judge considered all the evidence in the records capable of reasonable inference. The trial judge's analysis, to the contrary, represents a logical and conscientious attempt to reconcile complicated issues, competing testimony

and, above all, to insure a just verdict. The trial judge faithfully discharged his obligations; his grant of a new trial only as to defendant Hitchcock Clinic, Inc. is not such a clear error of judgment that it can be characterized as an abuse of discretion.

CONCLUSION

For the aforementioned reasons, the plaintiffs, Charles and Marion Coffran respectfully request this Court uphold the February 13, 1979 decision of the Court below.

Respectfully submitted,

CHARLES AND MARION COFFRAN,
By Their Attorneys,
BROWN AND NIXON PROFESSIONAL ASSOCIATION

By_____
Frank E. Kenison

Dated: December 14, 1981

CERTIFICATION

I hereby certify that a copy of the within Brief for the Plaintiffs, Appellees was this day mailed, postage prepaid, to Michael P. Lehman, Esq.

_____
Frank E. Kenison